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No. 80-1655

IN THE

Supreme Court of the United States

October Term, 1980

OSCAR WARING,

Petitioner,

v.

KALGRAD NAVIGATION COMPANY, INC.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

Petitioner Waring's Statement of the Case is little more than a labored recitation of the discredited allegations which he made at trial.

This was a credibility case. Waring claimed that the accident had been caused by three factors: (1) absence of any dunnage between the bundled pipe; (2) large amounts of pipe which had been deliberately broken out of bundles during stowage in Japan; and (3) the failure of the ship to close the hatch when supposedly requested to do so by the longshoremen during an extensive and heavy period of rainfall.

Over the course of an 8-day trial, Respondent Kalgrad refuted every one of Plaintiff's negligence contentions and demonstrated: (1) that the cargo was, in all respects, properly and adequately stowed and dunnaged in accordance with the custom of the trade; (2) that the strip dunnaging which is customarily used is inevitably compressed and reduced to debris during the voyage by the tremendous weight of a steel stow and that consequently, such dunnaging can never be expected to serve a function with respect to the discharge of the cargo; (3) that there had been no deliberate breaking of pipe from bundles during stowage in Japan; [1] (4) that there had been no heavy or continuous period of rainfall on the morning of the

1. Waring contended that he was standing on loose pipe which rolled under his feet and caused him to topple from the stow. His hatch foreman, Lyles, estimated that as much as 30% of the cargo had been intentionally broken out of strapped bundles during stowage in Japan. This testimony, which Waring has chosen not to recount in his statement of the case, was irrebutably refuted by photographic evidence: In Baltimore, the preceding port, a surveyor had taken a photograph of the cargo in the No. 4 hatch, including the cargo bound for Philadelphia. This showed that the Philadelphia cargo was neatly in place, with all of the pipe in clearly formed bundles.

accident;[2] (5) that the stevedore was not compelled by any circumstances caused by Kalgrad to adopt the unsafe[3] method of using the forklift to discharge the cargo; to the contrary, the stevedore had at its disposal, but chose to ignore, several methods of getting the cargo out safely under the existing circumstances.[4]

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2. Waring and his hatch foreman described a veritable deluge which lasted about one and a half hours and which required the men to stop work, flee the hatch, and seek shelter elsewhere on the ship. The stevedoring company's General Manager testified that under such circumstances, his company's time records would show any work stoppage in excess of 15 minutes. The stevedore's records for the date of the accident showed that there had been no work stoppage on account of rain at any of the several hatches which were being worked by longshoremen.

3. Even Waring's experts, Collins and Cullen, agreed that the stevedore's election to use the forklift truck was an improper and unsafe stevedoring method. Cullen and hatch foreman Lyles both admitted that the selection of appropriate equipment for use in the discharge operation was exclusively within the province of the stevedore. Even Lyles, who had decided to use the forklift in the first place, admitted that he was unable to get a good purchase under the pipe by means of the forklift blades, and that he was always concerned that the pipe would slide off of the blades.

4. On cross examination, hatch foreman Lyles conceded that when discharging bundled pipe, it is customary to take heavy pieces of wood known as "bearers" and to place them under the raised bundles before the winch sets the bundles down again. The use of bearers is designed to prevent the men from having to approach a bundle during any period of potential instability. Once the bearers are in place, the bundle is loaded onto them so that the men can then safely approach the cargo in order to position the discharge wire. The proper procedure is for the longshoremen to make an initial, short lift of one end of the bundle, just sufficient for the men to toss bearers beneath the pipe. The short lift can be accomplished either by means of a breakout wire (which does *not* have to be placed beneath the bundle—it is merely woven around a few of the protruding ends of the pipe in the bundle) or

During the Charge, the Trial Court reviewed in detail each of Waring's negligence contentions. The Court went on to instruct the jury:

> "° ° ° you may find the defendant liable upon a showing of the following: First, that the vessel knew or by the exercise of reasonable care could have discovered a condition on board ship that led to the injury; second, that the vessel owner knew or should have known that the condition would pose an unreasonable risk of harm to the longshoremen working on board the ship; third, that the vessel failed to exercise reasonable care to protect longshoremen against that danger, if any.[5]
>
> It was the continuing duty of the defendant shipowner at the time and place of the accident in question to use ordinary care under the circumstances to furnish the plaintiff a reasonably safe place in which to work aboard the ship and to use ordinary care under the circumstances to maintain and keep the

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4. (Cont'd.)

by means of specially designed pipe hooks. Lyles admitted that the stevedore had pipe hooks available for this purpose, but claimed that he decided not to use them because of the alleged presence of enormous amounts of loose pipe in the stow. Incredibly, Lyles did not even have the men toss bearers beneath the pipe when he raised the ends of bundles by forklift; instead, he had the men pass the discharge wire beneath the bundles while they were precariously resting on the forklift blade. The accident occurred as Waring was waiting for his partner to toss him the wire. The pipes fell off of the forklift blade and Waring, apparently trying to avoid being hit, fell over the edge of the cargo to the deck of the hatch.

5. Following *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F. 2d 116 (3d Cir. 1979); *vacated and remanded*, — U. S. — (No. 79-813, May 4, 1981).

place of work in a reasonably safe condition. * * *" (1054a).[6]

Under this excessively[7] broad statement of care—a charge extraordinarily favorable to Waring—the jury would have been compelled to find Kalgrad negligent had it believed even one of Waring's negligence contentions. Special Interrogatories were put to the jury segregating the issues of negligence and causation. The jury never had to reach the question of causation because it found, plainly and simply, that Kalgrad had not been negligent.[8]

With good reason, the jury did not believe Waring. The Court of Appeals for the Third Circuit, with the benefit of extensive Briefs from both parties and the full trial record, clearly recognized this when it affirmed the judgment of the District Court by per curiam Order.

Waring's Statement of the Case, in spite of its obvious bias, serves one very useful purpose for this Court: It is absolutely silent as to the one point of evidence which would have a bearing on the question which Waring says is before this Court, i.e., that Kalgrad had "scienter" of the stevedore's violation of the OSHA Regulations.[9] There is no mention of any such evidence because none existed. For that reason alone, the Petition should be denied.

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6. Page references are to the Appendix to the Briefs filed in the Third Circuit.

7. *Scindia Navigation Co., Ltd. v. De Los Santos,* — U. S. — (No. 79-512, April 21, 1981).

8. Waring tries to evade the fact that the jury finding of no negligence represented a repudiation of his factual contentions with the mystical pronouncement that "Despite the fact that Interrogatories were submitted requiring the jury to answer seriatim questions as to negligence and causation, the language speaks in the sense of a general verdict." *Petition* at 12.

9. *Safety and Health Regulations for Longshoring,* U. S. Dept. of Labor, 29 C. F. R. §§ 1918.1 *et seq.*

ARGUMENT

I. Nothing in the Record Raises the Question Presented in the Petition.

Waring frames the sole question presented in his Petition as follows:

> "Whether the Court may permit receipt of testimony as to longshoremen's violation of OSHA regulations and not charge the jury that the shipowner's scienter of such violations renders the shipowner liable to the longshoremen?"

Petition at *i.*

As noted previously, there was not a shred of evidence presented at trial to support the notion that Kalgrad had "scienter" of the stevedore's violation of applicable OSHA Regulations.[10] Tellingly, in his argument (*Petition* at

10. The following provisions of 29 C. F. R. § 1918 were admitted into evidence:

1918.2(a): "The responsibility for compliance with the regulations of this part is placed upon 'employers' as defined in § 1918.3(c)."

1918.2(b): "It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom."

1918.3(a): "The term 'shall' indicates provisions which are mandatory."

1918.3(c): "The term 'employer' means an employer any of whose employees are employed in whole or in part, in longshoring operations or related employments, as defined herein

8-14), Waring never even discusses the one issue which he raises for this Court's consideration. To the contrary, Waring uses a scattergun to attack a variety of other imagined insufficiencies in the record below.

II. Petitioner Has Misread the Very Portion of the Charge Upon Which He Relies.

Petitioner summarizes his argument as follows:

> "The Charge by the court that a violation of OSHA Regulations by the stevedore as the cause of the accident requires a verdict in favor of the shipowner is an error of law and in conflict with the Court of Appeals for the Ninth Circuit."

Petition at 8. Petitioner concludes that "to charge the jury that if the stevedore were in fact in violation of the OSHA Regulations then the shipowner could not be liable, was erroneous as a matter of law." *Petition* at 14.

Again, Petitioner argues against a principle which is not even raised in this case. The scant portion of the Trial Court's Charge quoted by Petitioner (at p. 9) merely states that where the stevedore's violation of OSHA Regulations "was the *sole* cause of the accident, then you must find for the defendant." *Petition* at 9.

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10. (Cont'd.)

within the Federal Maritime Jurisdiction on Navigable Waters of the United States."

1918.32(b): "When an edge of a hatch section or of stowed cargo more than 8-feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by a safety net of adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances."

1918.91(c): "Slippery conditions shall be eliminated as they occur."

The Trial Court never charged, as Petitioner suggests, that the fact that the stevedore had violated the OSHA Regulations, standing alone, could serve as a basis for exonerating Kalgrad.

In fact, in the paragraph of the Charge immediately preceding the portion which Petitioner has quoted (at p. 9), the Trial Court charged precisely the opposite principle:

> "On the other hand, if plaintiff was not personally at fault, *he may recover for his injuries in full against a negligent shipowner even where the negligence of the stevedore, his employer, contributed to his injuries, as long as the defendant shipowner was in some measure at fault.* The plaintiff may not, however, recover from the shipowner if the accident was due solely to the negligence of his employer, or the defendant was not in any measure negligent." (1051-1052a) (emphasis added).

Petitioner has been equally disingenuous in failing to call to this Court's attention the following portion of the Trial Court's Charge:

> "There had been reference made to OSHA regulations relating to longshoremen which are binding upon the employer of longshoremen. However, as clearly stated in the law, the OSHA regulations do not add to or subtract from the duties of the vessel and its officers and crew as heretofore established by custom, law or practice." (1059a).

Petitioner is no more accurate when he states that "Respondent's experts gave their opinion that * * * it was the violation of the OSHA Regulations that was the sole cause of the accident." *Petition* at 9. Respondent's ex-

perts did not so testify, nor did Kalgrad so contend at trial. To the contrary, Kalgrad argued that a variety of factors coalesced to produce the accident, principally the stevedore's improvident election to use a forklift to raise the bundles of pipe from the stow instead of using breakout wires and/or pipe hooks for this purpose, and the stevedore's failure to employ bearers during the breakout procedure so that the men working atop the cargo would not have to approach a draft during a period of potential instability.

The OSHA Regulations were offered in order to apprise the jury of the stevedore's customary obligations in a discharge situation such as the one presented in this case. Obviously, the stevedore's failure to put up a safety net did not cause the accident. But the jury was entitled to know who had the responsibility to take such protective measures. For the very same reason, the jury was entitled to know that the stevedore was required to remedy slippery conditions as they occurred during the conduct of the work.[11] Waring presented no evidence that under law, regulation, custom, or contract, Kalgrad had any parallel responsibility to take the protective measures which *were* required of the stevedore under the OSHA Regulations.

This Court has recently held:

> "We are of the view that absent contract provision positive law or custom to the contrary * * * the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover

11. Patently, Kalgrad did not contend at trial that the stevedore's failure to remedy slippery conditions had caused the accident. To the contrary, Kalgrad's efforts were directed to demonstrating to the jury that the drenching rainfall claimed by Waring had never even occurred and that the purported slippery conditions never existed.

dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoreman for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. This conclusion is plainly consistent with the congressional intent to foreclose the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty. The shipowner, within limits, *is* entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations."

De Los Santos, supra, Slip Op. at 15. (emphasis supplied in the original.)

By contrast, the Trial Court charged in this case that:

"It was the continuing duty of the defendant shipowner at the time and place of the accident in question to use ordinary care under the circumstances to furnish the plaintiff a reasonably safe place in which to work aboard the ship and to use ordinary care under the circumstances to maintain and keep the place of work in a reasonably safe condition. If the shipowner has actual knowledge of a dangerous condition or if a dangerous condition is such as should have been known to the shipowner in the exercise of ordinary care under the circumstances, then the law imposes upon the shipowner the duty to give the longshoremen reasonable warning of such danger or to protect the longshoremen against that danger." (1054-1055a).

Petitioner got more from the Trial Court than he deserved. The Trial Court, as noted, explicitly instructed

the jury that Kalgrad had the obligation to provide the longshoremen with a reasonably safe place in which to work. But this Court has now held that no such obligation exists.

> "As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. Section 41 of the Act, 33 U. S. C. § 941, requires the stevedore, the longshoremen's employer, to provide a 'reasonably safe' place to work and to take such safeguards with respect to equipment and working conditions as the Secretary of Labor may determine to be necessary to avoid injury to longshoremen. *The ship is not the common employer of the longshoremen and owes no such statutory duty to them.* * * *"

De Los Santos, supra, Slip Op. at 13 (footnotes omitted) (emphasis added).

Given the extraordinary extent to which the Trial Court's instructions favored Petitioner, the task for the jury in this case in resolving the liability issue was extraordinarily simple: If the jury had believed any of Waring's liability contentions, it would have returned a verdict in Waring's favor because Kalgrad would then have failed in its putative obligation to provide the longshoremen with a safe place to work. A verdict in Kalgrad's favor, in spite of the Charge which was given in this case should not lightly be disturbed.

III. Petitioner's Reliance on *Bachtel v. Mammoth Bulk Carriers, Ltd.* Is Misplaced.

In *Bachtel v. Mammoth Bulk Carriers, Ltd.*, 605 F. 2d 438 (9th Cir. 1979); *vacated and remanded,* — U. S. — (No. 79-538, May 18, 1981), the Ninth Circuit

held that under certain circumstances, evidence of the stevedore's obligations under the OSHA Regulations can be admitted, along with other evidence, to aid a jury in its determination of a vessel owner's alleged negligence under § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 905(b). 605 F. 2d at 446. In so holding, the Ninth Circuit relied heavily upon *Provenza v. American Export Lines, Inc.*, 324 F. 2d 660 (4th Cir. 1963), a pre-1972-Amendment case, which held that where negligent conduct of the stevedore, including violation of OSHA Regulations, was either known to or should have been known by a vessel owner, the vessel owner could be held liable to an injured longshoreman either for unseaworthiness or on grounds of imputed negligence. 324 F. 2d at 665.[12]

In the wake of this Court's decision in *De Los Santos*, the validity of the Ninth Circuit's *Bachtel* decision must be questioned. This Court has held:

> "[W]e cannot agree that the vessel's duty to the longshoreman requires the shipowner to inspect or supervise the stevedoring operation. Congress intended to make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore.' ' ' It would be inconsistent with the Act to hold, nevertheless, that the shipowner has a continuing duty to take reasonable steps

12. As conceded by the Ninth Circuit, the majority of the Circuits have limited application of the OSHA Regulations to stevedores and have held that they do not impose a duty on the shipowner. *Bachtel, supra*, 605 F. 2d at 444. It is noteworthy that the Fourth Circuit, which generated the *Provenza* decision, has itself disavowed *Provenza* as no longer having application following the 1972 Amendments. *Chavis v. Finn Lines, Ltd., O/Y*, 576 F. 2d 1072, 1082 (4th Cir. 1978).

> to discover and correct dangerous conditions that develop during the loading or unloading process. Such an approach would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship. True, the liability would be cast in terms of negligence rather than unseaworthiness, but the result would be much the same * * *".

De Los Santos, supra, Slip. Op. at 11-12.

Aside from pointing to the fact that both this case and *Bachtel* involved, in different contexts, the same provision of the OSHA Regulations,[13] Petitioner never explains why he imagines *Bachtel* to be of value to him in this case.

In *Bachtel,* the Ninth Circuit stressed four factors which it apparently believed warranted imposition of liability on the vessel owner, on a *respondeat superior* basis for the stevedore's non-compliance with the OSHA Regulations: (1) the vessel dictated the methods employed by the longshoremen and directed the operative details of the stevedore's work; (2) the vessel was found to have actual knowledge that by reason of the loading method it had devised, the longshoremen were compelled to work near the edge of a dangerously high stow; (3) the vessel's crew worked alongside the longshoremen in lashing the cargo and were thereby exposed to the same dangers; (4) the vessel owner had actual knowledge that by reason of the design of the ship and by reason of the methods it had imposed upon the stevedore, the stevedore could not and would not be in a position to comply with the subject OSHA Regulations. 605 F. 2d at 443.

13. 29 C. F. R. § 1918.32, (relating to safety nets).

None of the four factors presented in *Bachtel* existed in this case. Kalgrad in no way directed the methods of the stevedore. To the contrary, the stevedore provided its own supervisory personnel, who alone selected the methods and equipment to be used in discharging the cargo. Kalgrad had neither actual nor constructive notice that the stevedore was not in compliance with the OSHA Regulations. Nothing about the stow, the vessel or any conditions imposed by Kalgrad prevented the stevedore from complying with the applicable OSHA Regulations, and the stevedore was, at all times, in a position to comply with the Regulations without any assistance from Kalgrad.

To the best that Respondent has been able to determine, Petitioner's thesis is that whenever a stevedore violates OSHA Regulations, such violation should be imputed to the vessel owner because "the vessel owner should have foreseen that the stevedore might violate OSHA Regulations." *Petition* at 12.

If vessel owners were to be held to the standard that Petitioner contemplates, they would be required to make conditions on their vessels virtually foolproof. Such a standard is at odds with this Court's interpretation of § 905(b) in that it fails to take into consideration the expertise and experience of the stevedore and the vessel owner's rightful expectation that the stevedore will perform its work properly without supervision by the ship. *De Los Santos, supra,* Slip Op. at 9, 13.

Petitioner has nothing to complain of because his proposed standard was covered in the charge given by the District Court. As Petitioner has conceded (at p. 14), the District Court charged in accordance with the standard of care which the Ninth Circuit adopted in *Santos v. Scindia Steam Navigation Co.*, 598 F. 2d 480 (1979), and

which this Court rejected in *De Los Santos, supra.* The Trial Court instructed the jury that it could find Kalgrad liable if Kalgrad knew or should have known that a condition on the vessel posed an unreasonable risk of harm to the longshoremen working aboard the ship and that the vessel failed to exercise reasonable care to protect the longshoremen against that danger. *See, Griffith v. Wheeling-Pittsburgh Steel Corporation, supra,* 610 F. 2d at 126.[14]

CONCLUSION

The jury refused to believe Petitioner's liability allegations. Petitioner lost at the trial level in spite of a Charge which was overly favorable to him. The Trial Court did not charge that violation of OSHA Regulations by the stevedore would permit exoneration of the vessel owner. The Court charged the contrary principle, i.e., that the vessel could be held liable even if the stevedore had also been negligent.

There was no evidence of Kalgrad's "scienter" of the stevedore's failure to adhere to OSHA Regulations. The

14. For the sake of thoroughness, it is worth noting that Waring has alleged that the Trial Court charged in accordance with § 343 of the Restatement (Second) of Torts. *Petition* at 3 and 13. That is not true. It is noteworthy that Petitioner quotes not from the Court's Charge but from a Request for Charge submitted by Respondent which Petitioner claims the Trial Court "covered". *Petition* at 13. Petitioner raised the same point on appeal before the Third Circuit. The Third Circuit, which had the full text of the Trial Court's Charge before it, had no trouble summarily rejecting Waring's argument. The Third Circuit had previously rejected application of Restatement § 343 in cases arising under the Longshoreman's Act in *Griffith v. Wheeling-Pittsburgh Steel Corp., supra.*

question said to be raised by Petitioner is not even presented in this case.

It is respectfully prayed that the Petition be denied.

Respectfully submitted,

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